REPUBLIC OF SOUTH AFRICA

COMPANIES AMENDMENT BILL

(As agreed to by the Portfolio Committee on Trade, Industry and Competition (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF TRADE, INDUSTRY AND COMPETITION)

[B 27B—2023]

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GENERAL EXPLANATORY NOTE:

[ ]	Words in bold type in square brackets indicate omissions from existing enactments.
_____	Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Companies Act, 2008, so as to insert certain definitions and amend the definition of "securities"; to clarify when a Notice of Amendment of a Memorandum of Incorporation takes effect; to provide for the Commission to publish, as prescribed, the notice of the location of a company's records; to differentiate where the right to gain access to companies' records may be limited; to provide for the preparation, presentation and voting on companies' remuneration policy and directors' remuneration report; to provide for the filing of a copy of the annual financial statement; to empower the court to validate the irregular creation, allotment or issue of shares; to clarify that shares which are not fully paid are to be transferred to a stakeholder and dealt with in terms of a stakeholder agreement; to exclude the subsidiary company from the requirements relating to financial assistance; to provide for instances where a special resolution is required for the acquisition by a company of its own shares; to provide for a social and ethics committee report and remuneration report to also be presented at an annual general meeting of a public company; to provide for the circumstances under which a private company will be a regulated company; to provide for the publication of the application for exemption from the requirement to appoint a social and ethics committee; to deal with the composition of the social and ethics committee; to provide for the preparation by the social and ethics committee of a social and ethics committee report, as prescribed, to be presented at the annual general meeting or shareholders meeting, as the case may be; to provide, in respect of a private company, personal liability company or non-profit company, for the appointment of an auditor at a shareholders meeting if such appointment is a requirement in terms of the Act; to extend the definition of an employee share scheme to include situations where there are purchases of shares of a company; to provide for the determination by the Minister, in consultation with the Panel, of financial thresholds, for purposes of identifying the private companies to which Parts B and C of Chapter 5 of the Act apply; to provide for post-commencement finance for unpaid amounts that are due to the landlord during business rescue proceedings; to provide for the Commission to substitute a contested name of a company under certain circumstances; to provide for mediation, conciliation and arbitration by the Companies Tribunal only in respect of relief or complaints in terms of the Act; to further provide for the operation and governance of the Companies Tribunal; to provide for pronouncements that may be issued by the Financial Reporting Standards Council; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 71 of 2008, as amended by section 1 of Act 3 of 2011, section 111 of Act 19 of 2012 and section 55 of Act 22 of 2022

1. Section 1 of the Companies Act, 2008 (Act No. 71 of 2008), (hereinafter referred to as the ''principal Act''), is hereby amended—

(a) by the insertion after the definition of ''Banks Act'' of the following definitions:

'' **'B-BBEE Act'** means the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003);

'B-BBEE Commission' means the Broad-Based Black Economic Empowerment Commission as established in terms of the B-BBEE Act;''; and

(b) by the substitution for the definition of ''securities'' of the following definition:

'' **'securities'**, for the purposes of this Act, means any shares**[,]** or debentures **[or other instruments]**, irrespective of their form or title, issued or authorised to be issued by a profit company;''.

Amendment of section 16 of Act 71 of 2008, as amended by section 11 of Act 3 of 2011

2. Section 16 of the principal Act is hereby amended by the substitution in subsection (9) for paragraph *(b)* of the following paragraph:

''*(b)* in any other case, **[on the later of]** —

(i) **[the date on, and time at, which the Notice of Amendment is filed]** 10 business days after receipt of the Notice of Amendment by the Commission, unless endorsed or rejected with reasons by the Commission prior to the expiry of the 10 business days period; or

(ii) **[the]** such later date, if any, as set out in the Notice of Amendment.''.

Amendment of section 25 of Act 71 of 2008

3. Section 25 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:

''A company must file a notice, which the Commission must publish as prescribed, setting out the location or locations at which any particular records referred to in section 24 are kept or from which they are accessible if those records—''.

Amendment of section 26 of Act 71 of 2008, as amended by section 17 of Act 3 of 2011

4. Section 26 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph *(c)* of the following paragraph:

''*(c)* the reports to annual meetings **[, and annual financial statements,]** as mentioned in section 24(3)*(c)*(i) **[and (ii)]**;'';

(b) by the insertion in subsection (1) after paragraph *(c)* of the following paragraph:

''*(c*A*)* the annual financial statements as stipulated in section 24(3)*(c)*(ii);'';

(c) by the deletion in subsection (1) of the word ''and'' at the end of paragraph *(d)*, the substitution at the end of paragraph *(e)* for a full stop of a semicolon, the insertion of the word ''and'' at the end of paragraph *(e)*, and by the addition of the following paragraph:

''*(f)* the register of the disclosure of beneficial interest of the company as mentioned in section 56(7)*(a)*.'';

(d) by the substitution for subsection (2) of the following subsection:

''(2) A person not contemplated in subsection (1) has a right to inspect **[or]** and copy **[the securities register of a profit company, or the**

members register of a non-profit company that has members, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection] the information contained in the records referred to in subsection (1)*(a)*, *(b)*, *(c*A*)*, *(e)* and *(f)*, upon payment of the prescribed fee for any such inspection and copy.'';

(e) by the insertion after subsection (2) of the following subsection:

''(2A) The right to inspect and copy information contained in the records referred to in subsection (1)*(c*A*)*, as contemplated in subsection (2), does not apply to a private company, non-profit company or personal liability company, wherein—

(a) an annual financial statement is internally prepared in a company with a public interest score of less than 100; or

(b) an annual financial statement is independently prepared in a company with a public interest score of less than 350.'';

(f) by the substitution in subsection (4) for paragraph *(a)* of the following paragraph:

''*(a)* for a reasonable period during business hours at a location referred to in section 25(1);'';

(g) by the substitution for subsection (5) of the following subsection:

''(5) Where a company receives a request **[in terms of]**, as comtemplated in subsection (4)*(b)*, it must within **[14]** 10 business days comply with the request by providing the requester an opportunity to inspect or copy the register or the records concerned **[to the person making such request]**.''; and

(h) by the deletion of subsection (6).

Amendment of section 30 of Act 71 of 2008, as amended by section 20 of Act 3 of 2011

5. Section 30 of the principal Act is hereby amended—

(a) by the substitution in subsection (4) for paragraph *(a)* of the following paragraph:

''*(a)* the remuneration, as defined in subsection (6), and benefits received by each individual director, **[, or]** and **[individual holding any prescribed office]** prescribed officer in the company, both of whom must be named;''; and

(b) by the insertion after subsection (4) of the following subsection:

''(4A) Where any provisions of the directors' remuneration report, as contemplated in section 30B, becomes subject to an audit in terms of this section, any company policies or the background statement of the remuneration report must not be made subject to such audit.''.

Insertion of sections 30A and 30B in Act 71 of 2008

6. The following sections are hereby inserted in the principal Act after section 30:

''**Duty to prepare and present company's remuneration policy**

30A. (1) All public companies and state-owned companies must prepare and present for approval a remuneration policy as contemplated in subsection (2).

(2) The remuneration policy—

(a) must be presented to and approved by shareholders at the annual general meeting by an ordinary resolution and if not approved must be presented at the next annual general meeting or at a shareholders meeting called for such purpose;

(b) will remain in force for a period of three years from approval and must be approved every three years thereafter; and

(c) may be amended prior to the end of the three-year period provided that any material amendment can only be implemented after it is approved by the shareholders by an ordinary resolution at a shareholders meeting called for this purpose or at an annual general meeting.

Duty to prepare and present company's remuneration report

30B. (1) In this section—

(a) "**total remuneration**" means all salary and benefits received including any employer contributions to benefit funds and any short-term or long-term incentives including share options and incentive awards;

(b) "**employee**" means an employee as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995); and

(c) "**committee**" means the remuneration committee of the company or any other committee of the company responsible for remuneration matters.

(2) Each year all public companies and state-owned companies must prepare a remuneration report in respect of the previous financial year for presentation and approval at the annual general meeting.

(3) The remuneration report must consist of the following parts:

(a) Background statement;

(b) a copy of the company's remuneration policy as contemplated in section 30A(2); and

(c) an implementation report containing details of:

(i) the total remuneration received by each director and prescribed officer in the company;

(ii) the total remuneration in respect of the employee with the highest total remuneration;

(iii) the total remuneration in respect of the employee with the lowest total remuneration in the company; and

(iv) the average total remuneration of all employees, median remuneration of all employees and the remuneration gap reflecting the ratio between the total remuneration of the top five per cent highest paid employees and the total remuneration of the bottom five per cent lowest paid employees of the company.

(4) If at the annual general meeting the remuneration report is not approved by ordinary resolution as contemplated in subsection (2)—

(a) the committee must, at the next annual general meeting, present an explanation on the manner in which the shareholders' concerns have been taken into account; and

(b) subject to subsection (6), the directors who are not involved in the day-to-day management of the business of the company and who serve on the committee must stand for re-election as members of the committee at the annual general meeting at which the explanation is presented.

(5) Subject to subsection (6), if at the annual general meeting in the year immediately following the year contemplated in subsection (4), the remuneration report in respect of the previous financial year is also not approved by ordinary resolution of shareholders—

(a) the directors who are not involved in the day-to-day management of the business of the company and who serve on the committee may continue to serve as directors provided they successfully stand for re-election at that annual general meeting; and

(b) will not be eligible to serve on the committee for a period of two years thereafter.

(6) The provisions of subsections (4)*(b)*, (5)*(a)* and *(b)* do not apply to members of the committee who have served for a period of less than 12 months in the year under review.".

Amendment of section 33 of Act 71 of 2008, as amended by section 23 of Act 3 of 2011 and section 56 of Act 22 of 2022

7. Section 33 of the principal Act is hereby amended by the substitution for subsection (1)*(a)* of the following subsection:

"(1) Every company must file an annual return with the Commission in the prescribed **[form with the prescribed fee, and within the prescribed period]**

manner after the end of the anniversary of the date of its incorporation, including in that return—

(a) a copy of its **[annual financial statements, if it is required to have such statements audited in terms of]** latest annual financial statements approved by the board for the public company, state-owned company or any other profit or non-profit company whose public interest score exceeds the limits set out in section 30(2) or the regulations contemplated in section 30(7);''.

Insertion of section 38A in Act 71 of 2008

8. The following section is hereby inserted in the principal Act after section 38:

''**Validation of irregular creation, allotment or issuing of shares**

38A. (1) Where a company purports to create, allot or issue shares by virtue of any provision of this Act, the Memorandum of Incorporation of the company, any other law or otherwise, where the creation, allotment or issuing of those shares is invalid or the terms of creation, allotment or issue are inconsistent with, or not authorised by those provisions, a court may—

(a) upon receipt of an application made by the company or by any party who holds an interest in the company; and

(b) after satisfying itself that it is just and equitable to do so,

make an order validating the creation, allotment or issue of these shares or confirming the terms of the creation, allotment or issue, subject to such conditions as may be imposed by the court.

(2) After the payment of all prescribed fees by the company, the shares are deemed to have been validly created, allotted or issued upon the terms of the creation, allotment or issue of the shares and subject to the conditions as may be imposed by the court.''.

Amendment of section 40 of Act 71 of 2008, as amended by section 28 of Act 3 of 2011

9. Section 40 of the principal Act is hereby amended—

(a) by the substitution in subsection (5)*(b)* for subparagraph (ii) of the following subparagraph:

''(ii) cause the issued shares to be transferred to a **[third party]** stakeholder, to be held in **[trust]** terms of a stakeholder agreement, and later transferred to the subscribing party in accordance with **[a trust]** the stakeholder agreement.'';

(b) by the substitution in subsection (6) for the words preceding paragraph *(a)* of the following words:

''(6) Except to the extent that a **[trust]** stakeholder agreement contemplated in subsection (5)*(b)* provides otherwise—''; and

(c) by the insertion after subsection (6) of the following subsection:

''(6A) For the purposes of subsections (5) and (6)—

(a) **'stakeholder'** means an independent third party, who has no interest in the company or the subscribing party, who may be in the form of an attorney, notary public or escrow agent; and

(b) **'stakeholder agreement'** means a written contract between the stakeholder and the company.''.

Amendment of section 45 of Act 71 of 2008, as amended by section 31 of Act 3 of 2011

10. Section 45 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

''**[Loans or other financial assistance to directors] Financial assistance**''; and

(b) by the insertion after subsection (2) of the following subsection:

''(2A) The provisions of this section do not apply to the giving by a company of financial assistance to or for the benefit of its subsidiaries.''.

Amendment of section 48 of Act 71 of 2008, as amended by section 32 of Act 3 of 2011

11. Section 48 of the principal Act is hereby amended by the substitution for subsection (8) of the following subsection:

''(8) A decision by the board of a company, contemplated in subsection (2)*(a)*, must be approved by a special resolution of the shareholders of the company—

(a) if any shares are to be acquired by the company from—

(i) a director of the company;

(ii) a prescribed officer of the company; or

(iii) a person related to a director of the company or a prescribed officer; or

(b) if it entails the acquisition of shares in the company, other than shares acquired as a result of—

(i) a *pro rata* offer made by the company to all shareholders of the company or a particular class of shareholders of the company, notwithstanding that the *pro rata* offer made to all shareholders may also include shareholders who are one or more of the persons referred to in paragraph *(a)*; or

(ii) transactions effected on a recognised stock exchange on which the shares of the company are traded, being a licenced exchange as contemplated in the Financial Markets Act, 2012 (Act No. 19 of 2012).''.

Amendment of section 61 of Act 71 of 2008, as amended by section 39 of Act 3 of 2011

12. Section 61 of the principal Act is hereby amended—

(a) by the deletion in subsection (8)*(a)* of the word ''and'' at the end of subparagraph (ii) and the addition of the following subparagraphs, respectively:

''(iv) a social and ethics committee report; and

(v) a remuneration report;''; and

(b) by the deletion in subsection (8)*(c)* of the word ''and'' at the end of subparagraph (i) and by the addition of the following subparagraph:

''(iii) social and ethics committee; and''.

Amendment of section 72 of Act 71 of 2008, as amended by section 47 of Act 3 of 2011

13. Section 72 of the principal Act is hereby amended—

(a) by the substitution for subsection (5) of the following subsection:

''(5) A company that falls within the category of companies that are required in terms of this section and the regulations to appoint a social and ethics committee may apply to the Tribunal for an exemption from that requirement in the following manner:

(a) The company must publish the intention to lodge an application for exemption with the Tribunal in the prescribed manner; and

(b) apply to the Tribunal, in the prescribed manner and form, for an exemption from the requirement, and the Tribunal may grant such exemption if it is satisfied that—

(i) the company has a formal mechanism within its structures, which substantially performs the functions of the social and ethics committee in terms of this section and the regulations; or

(ii) it is not reasonably necessary, having regard to the nature and extent of the structures and activities of the company and the public interest, to require the company to have a social and ethics committee;''.

(b) by the insertion after subsection (6) of the following subsections:

''(6A) A social and ethics committee is not required where—

(a) the company is a subsidiary of another company that has a social and ethics committee, and the existing social and ethics committee will perform the functions required by this section on behalf of the subsidiary company; or

(b) the company has been exempted by the Tribunal in terms of subsections (5) and (6).

(6B) The Minister may prescribe the minimum qualifications, skills and experience requirements for members of the social and ethics committee that he or she may consider necessary to ensure that any such committee comprises persons with adequate relevant knowledge and experience to equip the committee to perform its functions.'';

(c) by the insertion after subsection (7) of the following subsection:

''(7A) The social and ethics committee of a company must comprise not less than three members: Provided that—

(a) in the case of a public company and state-owned company, the majority of the members must be directors who are not involved in the day-to-day management of the business of the company and must not have been so involved at any time during the previous three financial years; and

(b) in the case of any other company, not being a public company or state-owned company, the members must consist of not less than three directors or prescribed officers, at least one of whom must be a director, who is not involved in the day-to-day management of the business of the company and must not have been so involved within the previous three financial years.'';

(d) by the insertion after subsection (8) of the following subsection:

''(8A) A board of a company that is required to have a social and ethics committee that—

(a) exists on the effective date, must appoint the first members of the committee within 12 months after—

(i) the effective date; or

(ii) the determination by the Tribunal of the company's application, if any, and the Tribunal has not granted the company an exemption; and

(b) is incorporated on or after the effective date, must constitute a social and ethics committee within 12 months after—

(i) its date of incorporation, in the case of a public company or state-owned company; or

(ii) in the case of any other company, not being a public company or state-owned company, the date the company first met the criteria determined in terms of subsection (4)*(a)*.'';

(e) by the insertion after subsection (9) of the following subsection:

''(9A) Thereafter—

(a) at each annual general meeting of a public company or state-owned company, such company must elect a social and ethics committee; or

(b) a social and ethics committee must be appointed annually by the board of the company where such company is any other company, not being a public company or state-owned company, required to have a social and ethics committee.''; and

(f) by the insertion after subsection (10) of the following subsections:

''(10A) Where a vacancy arises in the social and ethics committee, the board must appoint a person within 40 days after the vacancy arises, to fill such vacancy.

''(10B)*(a)* A social and ethics committee must prepare for shareholders a social and ethics committee report in the prescribed manner and form describing how the committee performed its functions in terms of this Act and the regulations.

(b) The social and ethics committee must present its report—

(i) in the case of a public company or state-owned company, at its next annual general meeting; or

(ii) in the case of any other company, not being a public company or state-owned company, annually at a shareholders meeting or with a resolution as contemplated in section 60(1).''.

Amendment of section 90 of Act 71 of 2008, as amended by section 55 of Act 3 of 2011

14. Section 90 of the principal Act is hereby amended—

(a) by the substitution for subsection (1A) of the following subsection:

"(1A) A company referred to in section 84(1)*(c)*(i), or a company that is required only in terms of its Memorandum of Incorporation to have its annual financial statements audited as contemplated in sections 34(2) and 84(1)*(c)*(ii), must appoint an auditor **[—**

***(a)* in accordance with subsection (1), if the requirement to have its annual financial statements audited applies to that company when it is incorporated; or**

***(b)* at the annual general meeting at which the requirement first applies to the company, and each annual general meeting thereafter.]** at a shareholders meeting at which the requirement first applies to the company, and thereafter annually at the shareholders meeting."; and

(b) by the substitution in subsection (2)*(b)* for subparagraph (v) of the following subparagraph:

"(v) a person who, at any time during the **[five]** two financial years immediately preceding the date of appointment, was a person contemplated in any of subparagraphs (i) to (iv); or".

Amendment of section 95 of Act 71 of 2008, as amended by section 58 of Act 3 of 2011

15. Section 95 of the principal Act is hereby amended by the substitution in subsection (1)*(c)* for subparagraph (i) of the following subparagraph:

"(i) by means of the issue or purchase of shares in the company; or".

Amendment of section 118 of Act 71 of 2008, as amended by section 73 of Act 3 of 2011

16. Section 118 of the principal Act is hereby amended—

(a) by the substitution in subsection (1)*(c)* for subparagraph (i) of the following subparagraph:

"(i) it has 10 or more shareholders with a direct or indirect shareholding in the company and meets or exceeds the financial threshold of annual turnover or asset value determined in terms of subsection (2): Provided that the Panel may exempt any particular transaction affecting a private company in terms of section 119(6);"; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) The Minister, in consultation with the Panel, must determine the financial thresholds based on the annual turnover or asset value of the company in the Republic, in general or in relation to specific industries, for purposes of determining or identifying the private companies to which the provisions of Part B and Part C of this Chapter apply.".

Amendment of section 135 of Act 71 of 2008, as amended by section 86 of Act 3 of 2011

17. Section 135 of the principal Act is hereby amended—

(a) by the insertion after subsection (1) of the following subsection:

"(1A) To the extent that any amounts due to the landlord, subject to a contract by the company which is placed in business rescue proceedings, are not paid to the landlord during business rescue proceedings, in respect of and not exceeding the aggregate for all public utility services, such as, the company's share of rates and taxes, electricity, water, sanitation and sewer charges paid by the landlord to third parties during the business rescue period referred to in this section, is regarded as post-commencement financing and will be paid as contemplated in subsection (1)."; and

(b) by the substitution for subsection (3)*(a)* of the following subsection:

"After payment of the practitioner's remuneration and expenses referred to in section 143, post-commencement financing, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—

(a) in subsection (1) will be treated equally, but will have preference over—

(i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and

(ii) all unsecured claims against the company**[;or]**,

in subsection (1A) will rank below the claims contemplated in subsection (1), but ahead of all the secured and unsecured claims against the company; and".

Amendment of section 160 of Act 71 of 2008, as amended by section 99 of Act 3 of 2011

18. Section 160 of the principal Act is hereby amended by the insertion after subsection (4) of the following subsection:

"(5)*(a)* Where the Companies Tribunal has issued an administrative order in terms of subsection (3)*(b)*(ii), the administrative order must stipulate the date for compliance by the company.

(b) Where the company fails to change its name within the determined period in terms of the administrative order of the Companies Tribunal, the applicant may approach the Commission, after the expiration of the determined period, to substitute the name of the respondent with its company's registration number followed by 'Inc', '(Pty) Ltd', 'Limited' or 'SOC Ltd', as the case may be.".

Amendment of section 166 of Act 71 of 2008, as amended by section 105 of Act 3 of 2011

19. Section 166 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) As an alternative to applying for relief to a court, or filing a complaint with the Commission in terms of Part D, a person who would be entitled to apply for relief, or file a complaint in terms of this Act, may refer a matter that could be the subject of such an application or complaint for resolution by mediation, conciliation or arbitration to **[—** ***(a)*** **]** the Companies Tribunal **[;**

(b) **an accredited entity, as defined in subsection (3); or**

(c) **any other person]**.";

(b) by the substitution for subsection (2) of the following subsection:

"(2) If the Companies Tribunal,**[or an accredited entity,]** to whom a matter is referred for **[alternative dispute resolution]** mediation or conciliation, concludes that either party to the conciliation**[,]** or mediation **[or arbitration]** is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the Companies Tribunal **[or accredited entity]** must issue a certificate of non-resolution in the prescribed form **[stating that the process has failed]**.";

(c) by the insertion after subsection (2) of the following subsection:

"(2A) *(a)* Where the Companies Tribunal has issued a certificate of non-resolution stating that the mediation or conciliation process in terms of this Act has failed, the affected person may refer the matter further to the Companies Tribunal for arbitration.

(b) A party who wants to object to the arbitration also being conducted by a member of the Companies Tribunal who had attempted to resolve the matter through mediation or conciliation may do so by filing an objection in that regard with the Companies Tribunal.

(c) When the Companies Tribunal receives an objection it must appoint another member to substitute the member in terms of whom the objection was filed.

(d) In the event of arbitration, the arbitrator's award is final and binding on the parties.''; and

(d) by the deletion of subsections (3), (4) and (5).

Amendment of section 167 of Act 71 of 2008

20. Section 167 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

''If the Companies Tribunal **[, or an entity accredited in terms of section 166,]** has resolved, or assisted parties in resolving, a dispute in terms of this Part, the Tribunal **[or accredited entity]** may—''.

Amendment of section 194 of Act 71 of 2008, as amended by section 112 of Act 3 of 2011

21. Section 194 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection:

''(1A)*(a)* The chairperson of the Tribunal is the accounting authority of the Tribunal and is responsible for—

(i) the control and management of the Tribunal;

(ii) the effectiveness and efficiency of the Tribunal;

(iii) all the income and expenditure of the Tribunal;

(iv) all assets and the discharge of liabilities of the Tribunal; and

(v) the proper diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the Tribunal.

(b) In order to assist him or her with the functions contemplated in this subsection, the chairperson may appoint—

(i) a Chief Operating Officer for a period of five years, who may be reappointed for a further period of five years; and

(ii) one or more senior managers, under such terms and conditions as determined by the chairperson.

(c) The Chief Operating Officer is responsible to perform as the Chief Operating Officer of the Tribunal, subject to—

(i) this Act and its regulations;

(ii) the Public Finance Management Act and its regulations; and

(iii) the policies and directions of the Tribunal.

(d) The Chief Operating Officer is responsible for appointing such other employees as may be required for the proper functioning of the Tribunal: Provided that the chairperson, in consultation with the Minister, may determine the remuneration, allowances, employment benefits and other terms and conditions of employees appointed in terms of this paragraph.

(e) The Minister must, in consultation with the Minister of Finance, determine the remuneration, allowances, benefits and conditions of appointment of—

(i) members of the Tribunal; and

(ii) the Chief Operating Officer.''.

Amendment of section 195 of Act 71 of 2008, as amended by section 113 of Act 3 of 2011

22. Section 195 of the principal Act is hereby amended by the deletion in subsection (1) of the word ''and'' at the end of paragraph *(b)*, the substitution for the full stop of a semi-colon at the end of paragraph *(c)*, and the addition of the following paragraphs:

''*(d)* conciliate, mediate, arbitrate or adjudicate on any administrative matters affecting any person in terms of this Act as may be referred to it in the prescribed manner by the B-BBEE Commission in terms of the B-BBEE Act; and

(e) make an appropriate order.''.

Amendment of section 204 of Act 71 of 2008

23. Section 204 of the principal Act is hereby amended—

(a) by the substitution for subsection (1)*(a)* of the following subsection:

''(1) The Financial Reporting Standards Council must—

(a) receive and consider any relevant information relating to the reliability of, and compliance with, financial reporting standards and adapt international reporting standards for local circumstances through the issue of financial reporting pronouncements and consider information from the Commission as contemplated in section 187(3)*(b)*;''; and

(b) by the addition of the following subsections:

''(2) For the purposes of this section, financial reporting pronouncements may be issued by the Financial Reporting Standards Council and published in the *Gazette*, from time to time, in relation to international reporting standards which require adaptation for local circumstances: Provided that such pronouncements are not in conflict with the International Financial Reporting Standards or the International Financial Reporting Standards for Small and Medium-sized Entities.

(3) **'financial reporting pronouncements'** means standards, guidelines and circulars developed, adopted, issued, or prescribed by the Financial Reporting Standards Council.''.

Amendment of arrangement of sections of Act 71 of 2008

24. The arrangement of sections of the principal Act is hereby amended—

(a) by the insertion after item 30 of the following items:

''**30A.** Duty to prepare and present company's remuneration policy

30B. Duty to prepare and present company's remuneration report'';

(b) by the insertion after item 38 of the following item:

''**38A.** Validation of irregular creation, allotment or issuing of shares'';

(c) by the substitution for item 45 of the following item:

''**45.** Financial assistance''; and

(d) by the substitution for the heading to Part C of Chapter 7 of the following heading:

''**[Voluntary]** Resolution of disputes''.

Short title and commencement

25. This Act is called the Companies Amendment Act, 2023, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COMPANIES AMENDMENT BILL

1. BACKROUND

1.1 The Department of Trade, Industry and Competition (''the dtic'') and its predecessor has undertaken a review of the Companies Act, 2008 (Act No. 71 of 2008) (''the Act''). The work involved extensive discussions by the Specialist Committee on Company Law and detailed discussions on the content of a draft Companies Amendment Bill (the ''Bill'') by organised business and labour at the National Economic Development and Labour Council (Nedlac). Based on these discussions, the Bill was tabled in Cabinet on 14 September 2021, with a request for Cabinet concurrence that the Bill be released for public comment.

1.2 On 1 October 2021 the Director-General of the dtic published an invitation to the public to comment on the Bill. This invitation was accompanied by a copy of the Bill and a background note and explanatory memorandum explaining the philosophical pillars of the proposed amendments.

1.3 Following the publication of the invitation, a number of comments were received. Those comments were carefully considered by the senior executives of the dtic, together with the assistance of the Specialist Committee on Company Law.

1.4 The Bill addresses the following key pillars:

1.4.1 First, the ease of doing business. In this regard it is important that company law should, among other factors, be clear, user friendly, consistent with well-established principles and not be over burdensome on the conduct of business. This is important not only for the attraction of foreign investors but also for the efficient and effective conduct of the domestic economy and for the creation of jobs. In addition, changes were made that are essentially purely administrative issues, enhancement of regulatory efficiency and tidying up of drafting deficiencies.

1.4.2 Second, the achievement of equity between directors and senior management on the one hand, and shareholders and workers on the other hand, as well as addressing public concerns regarding high levels of inequalities in society. Some of the proposed amendments are designed to achieve better disclosure of senior executive remuneration and the reasonableness of the remuneration. The provisions relating to transparency in respect of pay gap and the reasonableness of remuneration provide an objective benchmark which will assist the public dialogue on this topic. The fairly extensive amendments to the provision relating to the social and ethics committee are designed to deal with several of the policy areas.

1.5 It is also necessary to note, as is referred to hereunder, that at the end of 2022 the General Laws Amendment Act, 2022 (Act No. 22 of 2022) (the ''General Laws Amendment Act''), was passed pursuant to Cabinet's actions to address greylisting. In terms of the General Laws Amendment Act a number of amendments were effected to the Act and to numerous other statutes. Those amendments related to beneficial interests in shares and the concept of ''beneficial owner''. The effect of these amendments is that some of the provisions have effectively been achieved and are no longer necessary in the Bill. In addition, attention is drawn to the fact that on 24 May 2023 the Minister of Trade, Industry and Competition (''the Minister''), published regulations pursuant to the aforementioned amendments that were made to the Act in terms of the General Laws Amendment Act. These regulations largely reinforce the new provisions in the Act relating to beneficial interests in shares. Regulation 30(9) and (10) provide access to the public to the annual

returns filed with the Commission that now include a copy of the securities register as required in terms of section 50 of the Act.

2. CLAUSE BY CLAUSE DESCRIPTION OF BILL

2.1 **Clause 1** inserts the definitions of ''B-BBEE Act'' and ''B-BBEE Commission'' into section 1 of the Act, to enhance the interpretation of the principal Act. Furthermore, the clause proposes an amendment to the definition of ''securities'' to include only shares and debentures.

2.2 **Clause 2** proposes an amendment to section 16 of the Act by requiring that a Notice of Amendment will take effect 10 business days after receipt of the Notice of Amendment to the Memorandum of Incorporation, if the Commission, after the expiry of the 10 business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons, or a later date as set out in the notice of amendment.

2.3 **Clause 3** proposes an amendment to section 25 of the Act by requiring the Commission to publish the notice filed by the company in a prescribed manner.

2.4 **Clause 4** proposes an amendment to section 26 of the Act to give the right to any person to inspect and copy annual financial statements and excludes the application thereof to private companies, personal liability and non-profit companies that fall below a certain threshold.

2.5 **Clause 5** proposes an amendment to section 30 of the Act and provides that where remuneration and benefits are received by a director or prescribed officer of the company, that director or prescribed officer must be named. It further provides for the remuneration policy and background statement of the report not to be made subject to an audit.

2.6 **Clause 6** proposes the insertion of sections 30A and 30B in the Act by imposing the duty to prepare and present a company's remuneration policy and remuneration report and the manner of compiling the report by the public company. The implementation report to be presented and the required approval at the company's annual general meeting and the consequences to follow where the report fails to receive the required approval at the annual general meeting.

2.7 **Clause 7** proposes amendments to section 33 of the Act and requires public companies, state-owned companies and companies with a public interest score that exceeds the limit set out in the Act, to file with their annual returns, a copy of the company's latest financial statements.

2.8 **Clause 8** proposes the insertion of section 38A in the Act by empowering a court to validate the creation, allotment or issue of shares, which would otherwise be invalid, upon application before the court by a company or any person who holds an interest in the company.

2.9 **Clause 9** proposes an amendment to section 40 of the Act, requiring partly paid shares to be transferred to a stakeholder and held in terms of stakeholder agreement, until fully paid.

2.10 **Clause 10** proposes an amendment to section 45 of the Act to exclude the provisions thereof from applying to the giving of financial assistance by a holding company to its subsidiary.

2.11 **Clause 11** proposes an amendment to section 48 of the Act that a special resolution will not be required when a company is implementing a share buyback by means of an offer made *pro rata* to all shareholders, including where directors, prescribed officers or persons related to a director or prescribed officer of the company hold shares which are the subject of the

offer and will also not be required in respect of transactions effected on a recognised stock exchange. Section 48(8) has given rise to considerable problems in practice. There are difficulties in interpretation and in the application of the section, particularly in relation to transactions on the stock exchange. In order to remedy these difficulties, two categories of transactions were considered not to require any special protections for shareholders. These are share buybacks made *pro rata* to all shareholders and transactions on a recognized stock exchange. All the share buybacks require shareholder approval by means of special resolution. All share buybacks require compliance with the solvency and liquidity test. The amendments leave intact the remainder of section 48. Thus, after the amendment, section 48 will remain as is, save only for the change to subsection (8). Insofar as concerns regarding the application of sections 114 and 115 may arise in respect of share buybacks, the intention is that those sections remain applicable in respect of the circumstances provided thereunder but not in respect of share buybacks as contemplated by the proposed amendment to section 48.

2.12 **Clause 12** proposes amendments to section 61 of the Act by providing for the appointment of the social and ethics committee at the annual general meeting (AGM) and requiring the social and ethics committee report and remuneration report to be presented at the AGM.

2.13 **Clause 13** proposes amendments to section 72 of the Act by inserting provisions for a public company or state-owned entities and categories of companies which are required in terms of this section and regulations to appoint a social and ethics committee, and who wish to apply for an exemption from such requirement to lodge an application for exemption with the Companies Tribunal, as well as the requirements for granting the exemption. It further provides for the appointment and composition of the social and ethics committee, the filling of a vacancy, and the presentation at the AGM or shareholder's meeting of the social and ethics committee report.

2.14 **Clause 14** proposes an amendment to section 90 of the Act to determine that the appointment of an auditor must take place annually at a shareholders meeting. It also reduces from five years to two years the cooling off period arising from an auditor's involvement in aspects of the company.

2.15 **Clause 15** proposes the amendment of section 95 of the Act by providing that the employee share scheme may include the purchase of shares in the company.

2.16 **Clause 16** proposes the amendment of section 118 of the Act by providing a new definition of a private company for the jurisdiction of the Take-Over Regulation Panel over private companies. For this purpose a private company must have 10 or more shareholders with direct or indirect shareholding in the company and meet or exceed the financial threshold of annual turnover or asset value which shall be determined by the Minister in consultation with the Panel.

2.17 **Clause 17** proposes an amendment to section 135 of the Act by inserting subsection (1A), providing that any amounts due by a company under business rescue to the landlord in terms of a contract where the landlord has paid to any third party during the business rescue proceedings in respect of public utility services, company's share of rates and taxes, electricity and water, sanitation and sewer charges, will be regarded as post-commencement financing with the appropriate ranking of preferences arising therefrom.

2.18 **Clause 18** proposes amendments to section 160 of the Act by providing that the Companies Tribunal must stipulate the date in the administration order for the company to comply with, before the applicant can approach the Commission to change the name.

2.19 **Clause 19** amends section 166 of the Act by providing that if the Tribunal has issued a certificate stating that a mediation process has failed, an affected person may refer the matter to arbitration.

2.20 **Clause 20** proposes consequential amendments to section 167 of the Act by deleting certain obsolete provisions in section 167(1).

2.21 **Clause 21** proposes amendments to section 194 of the Act by inserting subsection (1A), conferring certain powers on the chairperson of the Tribunal, for the appointment of the Chief Operations Officer and for certain responsibilities thereto.

2.22 **Clause 22** proposes amendments to section 195 of the Act by giving the Tribunal the power to conciliate, arbitrate or adjudicate administrative matters affecting the company in terms of the Act as may be referred to it by the B-BBEE Commission.

2.23 **Clause 23** proposes amendments to section 204 of the Act by giving the Financial Reporting Standards Council the power to issue financial reporting pronouncements.

2.24 **Clause 24** proposes an amendment to the arrangement of sections in the principal Act by virtue of the insertion of new provisions into the principal Act.

2.25 **Clause 25** provides for the short title and commencement of the Act.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

3.1 The Bill was tabled in the Economic Sectors Employment and Infrastructure Development Cluster and Cabinet in 2018. A workshop was held with other government departments on the Bill in 2018. The Bill was published for comment in September 2018. Public submissions were received and considered. The Bill was revised. The stakeholders were also consulted in person (one on one), around 20 organisations. A stakeholder seminar was held in April 2019, 80 stakeholders from companies, entities and other organisations attended. In June 2019, the Bill was tabled at Nedlac. The constituencies made recommendations and the Bill was revised. In 2020, the Nedlac process was re-established due to the issues that were contentious and required further consultations. The consultations concluded in June 2021 with the Nedlac constituencies.

3.2 The changes to the Bill were substantive with further changes to the access to companies records and beneficial interest including the definition of true owner and remuneration reporting requirements and pay gaps disclosures. A legal opinion by Senior Counsel has confirmed the need to re-publish the Bill. The Bill was published again in October 2021.

3.3 Subsequent to the publication in the *Gazette*, the dtic received various submissions from stakeholders in different sectors within the South African corporate law environment. 78 submissions were received from the public following the publication of the Bill for public comment in October 2021. There were more than 900 email submissions of support or objections submitted by the public without the comments. They were reviewed and considered and the Bill was revised and submitted to the Office of the Chief State Law Adviser (OCSLA). The stakeholders who made submissions include Steyn Capital Management, Fluxmans, Quantum Foods, Amabhungane, Afriforum, Cliffe Dekker Hofmeyer, South African Reward Association, Altimax, Coronation, Sasol, Corruption Watch, Old Mutual, Mineral Council of South Africa, Pike Law (Adam Pike), Chartered Governance institute of South Africa, Allan Gray, Association of Black Security Investors and Practitioners (ABSIP), Financial Intelligence Center (FIC), International Corruption Network, Vodacom, Bizamour Practice Risk

Management, Association of Certified Risk Examiners, Association of Certified Fraud Examiners, Outsurance, Sakeliga, Banking Association of South Africa (BASA), Telkom, Bowmans, Business Unity South Africa, Black Management Forum, National Treasury, Catalytic Strategy Women Constituency Leadership, Werksmans, Multichoice, SASBO Finance Union, Southern Africa Venture Capital and Private Equity Association (SAVCA), and Clyde and Company.

3.4 The Specialist Committee on Company Law was consulted on the Bill. The Committee is established in terms of the Act, to advise the Minister on matters pertaining to the Act. A Socio-Economic Impact Assessment System was completed on the revised Bill, prepared by The Presidency.

4. FINANCIAL IMPLICATIONS FOR THE STATE

Any financial requirements will be accommodated within the existing budget and the budget of the affected regulatory entities.

5. PARLIAMENTARY PROCEDURE

5.1 The Constitution of the Republic of South Africa, 1996 (''the Constitution''), regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution. The Constitution distinguishes between four categories of Bills: Bills amending the Constitution (section 74); ordinary Bills not affecting provinces (section 75); ordinary Bills affecting provinces (section 76); and money Bills (section 77). Furthermore, Schedules 4 and 5 to the Constitution list functional areas of concurrent national and provincial legislative competence and functional areas of exclusive provincial legislative competence, respectively.

5.2 The tagging of Bills is dealt with either in terms of section 75 or section 76 of the Constitution, and these sections set out the process that must be followed when a Bill is submitted for approval. A Bill must be correctly tagged otherwise it would be constitutionally invalid. The Bill must be considered against the provisions of the Constitution relating to the tagging of Bills, and against the functional areas listed in Schedule 4 and Schedule 5 to the Constitution.

5.3 The test for tagging is not concerned with determining the sphere of government that has competence to legislate on a matter, nor the process concerned with preventing interference in the legislative competence of another sphere of government. In *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC) *(''Tongoane judgment'')*, the Constitutional court ruled on the test to be used when tagging a Bill. The court held in paragraph 70 and 72 respectively, that the ''*test for determining how a Bill is to be tagged must be broader than that for determining legislative competence. Whether a Bill is a section 76 Bill is determined in two ways. First by the explicit list of legislative matters in section 76(3), and second by whether the provisions of a Bill in substantial measure fall within a concurrent legislative competence.*'' The court held at paragraph 59 that the tagging test focuses on all provisions of the Bill in order to determine the extent to which they substantially affect functional areas listed in Schedule 4, and not on whether any of its provisions are incidental to its substance.

5.4 The Department holds the view that the Bill must be classified as a section 75 Bill. The Companies Amendment Bill of 2008 was tagged by Parliament as a section 75 Bill. The Companies Amendment Bill of 2011 was tagged by Parliament as a section 75 Bill. The amendments to the Companies Act made through the General Laws Amendment Act was tagged by Parliament as a section 75 Bill.

5.5 The Department holds the view that matters of ''trade'' set out in Schedule 4 to the Constitution refers to the activities in local markets, rather than corporate governance of firms in the economy. Given that the Companies Act has a long pedigree of tagging as a section 75 Bill, and in light of the content of the Bill (which does not deal with local trading arrangements but instead with governance of firms in the economy), it is appropriate that it be tagged as a section 75 Bill.

5.6 The OCSLA is of the opinion that the Bill seeks to provide for the regulation and governance of companies, which include amongst others, for-profit companies, private companies, public companies and state owned companies which may affect small, medium and large enterprises in the economy. The Bill also provide for resolutions or decisions regarding the allotment and acquisition of shares or securities for the benefit of a relevant company, whether it be for its shareholders, directors or members or employees. There is accordingly an aspect of ''trade'' that is at play in the regulation and governance of a company. It cannot be gainsaid that companies which the Bill seeks to regulate and provide governance principles for, may be in the business of some form of trade. One can concede that the Bill does not deal with the ''trades'' that may make up the business of companies. It is however our view that the company is the vehicle through which the ''trade'' of that company would be conducted. There is an inextricable link between the company (how it is regulated and governed) and its business (trade), which in our view exists symbiotic. In this regard, the reference to paragraph 69 of *Tongoane judgment* seems apposite which is *that "the subject-matter of a Bill may lie in one area, yet its provisions may have a substantial impact on the interests of provinces. And different provisions of the legislation may be so closely intertwined that blind adherence to the subject-matter of the legislation without regard to the impact of its provisions on functional areas in Schedule 4 may frustrate the very purpose of classification.".*

5.7 ''Trade'' is a functional area of concurrent national and provincial legislative competence as listed in Part A of Schedule 4 to the Constitution. It is accordingly the view of OCSLA that, since the subject matter of the Bill substantially affects a functional area listed in Schedule 4 to the Constitution, namely ''trade'', this Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution.

6. REFERRAL OF BILL TO HOUSE OF TRADITIONAL AND KHOI-SAN LEADERS

The OCSLA is of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to traditional or Khoi-San communities or pertaining to customary law or customs of traditional or Khoi-San communities, nor any matter referred to in section 154(2) of the Constitution.

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